

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of
the Las Virgenes Municipal Water
District for Review of Order
No. 76-27 (NPDES Permit
No. CA0056014), California
Regional Water Quality Control
Board, Los Angeles Region

ORDER NO. WQ 76-11

BY THE BOARD:

On March 22, 1976, the California Regional Water Quality Control Board, Los Angeles Region (Regional Board), considered the amended Report of Waste Discharge by Las Virgenes Municipal Water District (petitioner) proposing an all-year discharge of 4.5 mgd to Malibu Creek. Upon conclusion of testimony, the Regional Board moved to reaffirm the existing NPDES waste discharge requirements contained in Regional Board Order No. 76-27 and to deny the request for an all-year discharge by the petitioner.

On April 9, 1976, the petitioner filed a petition for review of the Regional Board.

I. BACKGROUND

This petition concerns waste discharge requirements for the petitioner's Tapia Water Reclamation Facility, hereafter referred to as the Tapia Plant.

Geographically, the Tapia Plant is located near Malibu Creek and discharges to it. Just downstream from the Tapia Plant Malibu Creek passes through Tapia Park, a county park owned and operated by the Los Angeles County Department of Parks and

Recreation. At its mouth, Malibu Creek traverses a small alluvial plain and forms a lagoon at the ocean shore. Public access to Malibu Creek in the vicinity of the discharge is generally limited to the areas adjacent to and immediately upstream and downstream of Tapia Park and to the tidal prism area. This relative inaccessibility is principally due to topography and private ownership of property which provides only limited access. Picnicking, hiking, fishing, beachwalking, wading and surfing are generally limited to the areas of accessibility mentioned above. Beneficial uses of Malibu Creek and the lagoon are specified in the applicable water quality control plan and include water contact recreation, noncontact water recreation, wildlife habitat, cold and warm freshwater habitat and fish spawning and migration.^{1/}

The Tapia Plant is an activated sludge treatment process with nitrification having a design capacity of 8 mgd and present treatment flows of 4.4 mgd. Currently, a small portion of the effluent from the Tapia Plant is reclaimed for agricultural use and landscape irrigation. The greater portion of the effluent is applied to spray disposal areas where cropping is a by-product of disposal. More recently, effluent flows in excess of that which

^{1/} I-2-6, Table 2-3, Beneficial Uses of Surface Waters In Los Angeles River Basin Planning Area, Basin 4B, Water Quality Plan Report, Los Angeles River Basin (4B).

can be reclaimed or applied to spray disposal areas have been applied to a series of percolation ponds.^{2/}

Within the past year, this is the second time that waste discharge requirements for the Tapia Plant have been considered by this Board. On July 21, 1975, the Regional Board adopted Order No. 75-93, waste discharge requirements for the Tapia Plant. These requirements, among other things, limited discharge by the petitioner as follows:

"IT IS HEREBY ORDERED, that Las Virgenes Municipal Water District, in order to meet the provisions contained in Division 7 of the California Water Code and regulations adopted thereunder, and the provisions of the Federal Water Pollution Control Act and regulations and guidelines adopted thereunder, shall comply with the following:

"A. Discharge Limitations

The discharge of wastes by Las Virgenes Municipal Water District to surface waters or tributaries thereto shall be limited to the following discharge conditions:

1. Cold weather discharge between mid-November and mid-March. This discharge shall be limited to flow in excess of that which can be reclaimed for beneficial use (see Provision D1 below).

^{2/} The future availability of the percolation ponds for the petitioner's use is uncertain. Although Regional Board Order No. 76-64 adopted on April 26, 1976, prohibits the use of the percolation ponds after September 15, 1976, it is anticipated that the petitioner will submit new information in hope of having the September 15, 1976, prohibition removed.

The waste discharge requirements adopted by the Regional Board for water reclamation and land disposal are not placed in issue by this petition.

- "2. Discharge during and immediately after periods of rain but not more than one day (24 hours) after such periods unless the spraying grounds are so thoroughly saturated they will not absorb additional water, as determined by tensiometers installed in the spraying areas or by another effective method approved in advance by the Executive Officer.
- "3. Dry-weather discharge of tracered effluent to Malibu Creek for specified stream study periods, as proposed. These discharges shall be limited to a flow rate of two million gallons per day (2 mgd), and to the specific dates proposed by the discharger, and listed hereinabove."

* * * * *

"D. Provisions

1. The Las Virgenes Municipal Water District shall encourage the use of reclaimed water for irrigation and other beneficial purposes."

On August 21, 1975, the Malibu Canyon Property Owners Association petitioned the State Water Resources Control Board (State Board) for review of Order No. 75-93, primarily contending that the proposed discharge was contrary to the requirements of the State Department of Health. An extensive hearing was held by the State Board on November 17, 1975, and evidence was received regarding the requirements of the Department of Health, the nature of the effluent of the Tapia Plant, the effluent limitations of Order No. 75-93. During the course of the hearing on November 17, 1975, it became apparent that there was a misunderstanding between petitioner and the Regional Board staff over the meaning of discharge limitation A.1. The discharger interpreted Order No. 75-93 as permitting a discharge to Malibu Creek and its tributary of all its wastewaters, except those wastewaters actually utilized for strictly reclamation purposes, e.g., agricultural irrigation, during the period from mid-November to mid-March. Under petitioner's interpretation, it was

not required to utilize its spray disposal facilities. The Regional Board staff, on the other hand interpreted Order No. 75-93 as permitting a discharge to Malibu Creek and its tributary only as a "last resort, when all other methods of disposal, including spray disposal, had been exhausted."

After hearing, and after consideration of the entire record, the State Board adopted State Board Order No. WQ 75-30. This Order, in effect, made a number of findings which can be summarized as follows:

1. State Department of Health requirements set forth in Section 60315, Chapter 4, Article 5, Division 4, Title 22, California Administrative Code, related to coliform organisms did not apply to the discharge of petitioner and, in any event, the effluent discharged by the Tapia Plant was consistently lower in coliform organisms than required by Section 60315.

2. State Department of Health concerns on treatment processes are actually related to the problem of turbidity and the Department would like to see turbidity limits of not more than 2 Jackson Turbidity Units in discharges to Malibu Creek and its tributary. The turbidity unit sought by the Department was actually met and even exceeded by the Tapia effluent.

3. The requirements of Order No. 75-93 did not violate any applicable criteria of the State Department of Health, but the Order was unclear as to the circumstances under which the petitioner could discharge to Malibu Creek and its tributary.^{3/}

3/ See Order No. WQ 75-30, In the Matter of the Petition of the Malibu Canyon Property Owners Association For Review Of Order No. 75-93 (NPDES Permit No. CA0056014) of the California Regional Water Quality Control Board, Los Angeles Region.

Accordingly, Order No. 75-93 was remanded to the Regional Board to review and revise Order No. 75-93 consistent with State Board Order No. WQ 75-30. The Regional Board did review its previous order, and on February 9, 1976, adopted Order No. 76-27, which clarified the intent of the Regional Board on the circumstances which would permit a discharge to Malibu Creek or its tributary. Order No. 76-27 provides in part:

"A. Discharge Limitations

The discharge of wastes by Las Virgenes Municipal Water District to surface waters or tributaries thereto shall be limited to the following discharge conditions:

1. Cold weather discharge between mid-November and mid-March. This discharge shall be limited to flow in excess of that which can be reclaimed for beneficial use (see Provision D1 below); in addition, discharger shall make maximum use of all available spray fields consistent with good management practices."

In the meantime, in September of 1975, the petitioner had filed a Report of Waste Discharge with the Regional Board which had, in effect, requested waste discharge requirements for a proposed year-round discharge from the Tapia Plant to Malibu Creek.

On March 22, 1976, the Regional Board conducted a public hearing regarding the petitioner's proposed year-round discharge to Malibu Creek. At the conclusion of the hearing, and on the recommendation of the Regional Board Executive Officer, the Regional Board denied the application of the petitioner for a year-round discharge and reaffirmed Order No. 76-27. As previously indicated, the petitioner filed a petition requesting review of the Regional Board's action on April 9, 1976.

II. CONTENTIONS AND FINDINGS

The contentions of the petitioner and our findings relative thereto are as follows:

1. Contention: Petitioner contends that the Regional Board's refusal to set waste discharge requirements for the proposed year-round discharge to Malibu Creek constitutes a "failure to act" within the meaning of Water Code Section 13320(a), and that the State Board should either take appropriate action itself, i.e., issue appropriate waste discharge requirements for the proposed discharge, or order the Regional Board to issue appropriate requirements for the proposed year-round discharge.

Findings: This contention is without merit. The Regional Board did act on March 22, 1976 by reaffirming Order No. 76-27 and specifically denying the petitioner's application for a year-round discharge to Malibu Creek. Reaffirmation of Order No. 76-27 obviously would prohibit discharge to Malibu Creek except during mid-November to mid-March, and even then would limit the discharge to excess wastewater after full use for reclamation and for spray field disposal. Denial of petitioner's application for a year-round discharge is an act which effectively prohibits the proposed discharge, since petitioner proposed a surface water discharge and statutory law prohibits such a discharge without waste discharge requirements. (See Water Code Section 13376). The propriety of the Regional Board action is another question which we will subsequently discuss.

2. Contention: Assuming that the Regional Board's determinations on March 22, 1976, do not constitute a failure

to act, the petitioner contends that the Regional Board must establish waste discharge requirements for the proposed discharge, that the Regional Board does not have the power to prohibit a discharge but only to limit the type and number of constituents in the proposed discharge, and that the Regional Board may not limit or restrict the volume of a proposed discharge.

In support of this contention, the petitioner has filed a Memorandum of Points and Authorities making reference to the following sections of the California Water Code and an opinion of the Attorney General.

Section 13376, California Water Code:

"Any person... proposing to discharge pollutants to the navigable waters of the United States within the jurisdiction of the state shall file a report of waste discharge in compliance with the procedures set forth in Section 13260..."

Section 13260, California Water Code:

"Any person...proposing to discharge waste within any region that could affect the quality of the waters of the state...shall file with the regional board of that region a report of the discharge containing such information as may be required by the board..."

Section 13377, California Water Code:

"...The regional boards shall...issue waste discharge requirements which ensure compliance with any applicable effluent limitations, water quality related effluent limitations..."^{4/}

Section 13263(a), California Water Code:

"The regional board...shall prescribe requirements as to the nature of any proposed discharge...the requirements shall implement relevant water quality control plans... and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose...the need to prevent nuisance..."^{4/}

^{4/} Emphasis added.

The petitioner then points out that Sections 13260 and 13263 are virtually identical with former Section 13054 of the California Water Code^{5/} and that with regard to the question of whether regional boards have the authority to prescribe requirements which restrict the volume or prohibit entirely the flow of sewage, the Attorney General formed the following conclusion regarding Section 13054 in 48 Ops.Atty.Gen. 85:

"The basic objective of the Water Quality Control Act is to protect the quality of State waters. Therefore, the concern of regional boards in regulating waste discharges is limited to matters involving the quality of waters which receive the discharge. The quality of these waters is obviously affected by the number of physical constituents of a given variety contained in a give discharge which threaten to create conditions of pollution or nuisance, but it is not otherwise affected by the volume of the discharge. That is, the volume of the discharge does not involve water quality except in so far as it bears on the volum of the physical properties which it carries. Thus, it would be proper for regional boards to regulate waste discharges by restricting the properties which may be contained in the discharge or located in the disposal area (16 Ops.Cal.Atty.Gen. 20 (1950)), but not by directly restricting the volume of the discharge itself."

5/ Former Section 13054, California Water Code, provided:

"Any person proposing to discharge sewage or industrial waste within any region, other than into a community sewer system, shall file with the regional board of that region a report of such proposed discharge. Upon the request of the regional board, any person presently discharging sewage or industrial waste within any region, other than into a community sewer system, shall file with the regional board of that region a report of such discharge. The reporting of a discharge of sewage from family dwellings in any area may be waived by the regional board. The regional board, after any necessary hearing, shall prescribe requirements as to the nature of such proposed or existing discharge with relation to the conditions existing from time to time in the disposal area or receiving waters upon or into which the discharge is made or proposed and notify the person making or proposing the discharge of its action. Such requirements may be revised from time to time. After receipt of such notice, the person so notified shall provide adequate facilities to meet any such requirements with respect to the discharge of sewage and industrial waste."

While the petitioner develops other legal arguments in support of its contention, these references are sufficient to delineate the principal thrust of petitioner's argument.

Findings: The arguments that the Regional Board must establish waste discharge requirements for any proposed discharge, and that the Regional Board does not have the authority to prohibit a discharge but only to limit the type and number of constituents in the proposed discharge, are really two sides of the same coin. They are susceptible of a concise and what we consider to be a conclusive answer. The Water Code specifically permits prohibitions against discharge. Water Code Section 13243 provides:

"A regional board, in a water quality control plan or in waste discharge requirements, may specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted."

While one might quibble over the language of Section 13243 insofar as it relates to a prohibition against "the discharge of waste" rather than a prohibition against "discharge", the simple fact is that this section has been uniformly interpreted since its enactment to permit a prohibition against "discharge" under certain conditions or in certain areas. This prior and consistent interpretation is entitled to great weight, and is supported by the legislative history of the Porter-Cologne Water Quality Control Act.^{6/}

^{6/} Water Code Section 13,000, et seq. For legislative history, see Final Report of the Study Panel regarding recommended changes in water quality control (March 1969) prepared for the California Legislature, pages 54-55, which indicates that Section 13243 was drafted to permit "a complete prohibition of discharge."

With respect to the authority to limit or restrict the volume of flow, we recognize that an opinion of the Attorney General is entitled to great weight. Nevertheless, that opinion was rendered in 1966, prior to the adoption of California Water Code Section 13243 and, therefore, to the extent that such opinion is inconsistent with a subsequently enacted statute, such opinion must be disregarded.

We need not search too far to find an example of what we would consider an appropriate limitation on flow. Assume, for example, a discharger proposing a discharge flow of 8 mgd with disposal facilities, including reclamation, spray disposal fields and percolation ponds, of a limited capacity of 4.5 mgd. Is there any real question that, under these circumstances, a Regional Water Quality Control Board would have any alternative except to limit the effluent flow to 4.5 mgd?^{7/}

In addition to statutory authority already cited, there is another source of legal authority which would, under appropriate circumstances, justify a prohibition or limitation upon discharge.

^{7/} See Water Code Section 13263, which requires waste discharge requirements which protect beneficial uses and prevent nuisance.

The California Environmental Quality Act (CEQA)^{8/} requires all state agencies to give major consideration to protection of the environment. Pursuant to the mandates of CEQA, the State Board adopted the following regulations:^{9/}

"2717. Submission of Information. Whenever any person applies to the state board or a regional board for waste discharge or water reclamation requirements, the state board or such regional board may require that person to submit data and information necessary to enable the state board or such regional board to determine whether the project proposed may have a significant effect on the environment.

"2718. Denial or Limitation of Requirements. The state board or a regional board may prohibit or condition the discharge of waste and may condition water reclamation in order to protect against environmental damage, to minimize adverse environmental impacts, or to ensure long-term protection of the environment."

Section 2717, allows the Regional Board to inquire into the broader environmental effects of projects receiving waste discharge requirements, on a case-by-case basis, and Section 2718 enables the Regional Board to act on data resulting from such inquiries by prohibiting or conditioning the discharge of waste. We believe that adoption of these regulations was an appropriate exercise of regulatory authority, and that these regulations are necessary to carry out the legislative mandates and policies contained within CEQA.

3. Contention: The petitioner makes a number of other contentions which we will not recite in detail. The basic thrust of all the remaining contentions is that the action of the Regional

^{8/} Section 21000, et seq., Chapter 1, Division 13, California Public Resources Code.

^{9/} Subchapter 17, Chapter 3, Title 23, California Administrative Code.

Board in prohibiting the proposed year-round discharge to Malibu Creek was improper because the prohibition is not supported by the evidence before the Regional Board. Petitioner contends, as a matter of fact, that a year-round discharge to Malibu Creek would have a number of advantageous and beneficial environmental consequences, such as stream augmentation, enhancement of fish and aquatic habitat, dilution of high concentrations of coliform and fecal coliform bacteria which occur naturally in Malibu Creek and Malibu Lagoon, dilution of the high concentration of TDS which occurs naturally in Malibu Creek, and numerous other benefits.

Findings: We have just indicated our belief that a Regional Board may, where appropriate, prohibit a proposed discharge. The issue raised by petitioner is whether the year-round prohibition which was in effect imposed against it on March 22, 1976, is in fact appropriate. Included within this general issue, is the issue of whether the partial prohibition related to discharge between mid-November and mid-March contained in Order No. 76-27 is appropriate.

In our estimation, a total or partial prohibition against a proposed discharge is appropriate when the prohibition involved is necessary:

1. To implement properly an approved and relevant water quality control plan;
2. To protect water quality and beneficial uses, i.e., to prevent nuisance, pollution, or contamination;
3. To protect adequately against environmental damage, to minimize adverse environmental impacts, or to ensure long-term protection of the environment.

To date, only two reasons have been advanced to justify a prohibition or limitation upon a discharge by petitioner to Malibu Creek or its tributaries. Both involve alleged water quality concerns. It has been alleged, (1) that the petitioner's discharge would create excess algae growth in Malibu Creek, and (2) that the discharge would adversely affect public health particularly due to the alleged viruses contained in the effluent from the Tapia Plant.

With respect to the problem of algae growth, the preponderance of the evidence in the record before us indicates that excess algae growth resulting from a discharge to Malibu Creek by the petitioner is not likely. In addition, at the March 22, 1976, hearing before the Regional Board, the petitioner, the Department of Water Resources, and the Department of Fish and Game indicated that, in their opinion, the discharge of petitioner would not cause an increase of algae per unit area of stream.^{10/}

With respect to the alleged health problem, we pointed out in State Board Order No. WQ 75-30 that "the Tapia Plant is an excellently operated and maintained treatment plant which produces an excellent effluent. As a matter of fact, the quality of the effluent actually exceeds the basic numerical parameter

^{10/} The Department of Water Resources also supported the proposed discharge as furthering its goal of maximizing reuse of water. The Department of Fish and Game supported the proposed discharge on the basis that it would enhance fish and aquatic life in Malibu Creek. Both Departments recommended a one-year trial period.

set forth in Section 60315", i.e., the disinfection criteria sought by the Department of Health...."Again, the evidence indicates that the turbidity parameter sought by the Department of Health is, in fact, being met, and even exceeded, by the District"... "In summary, although the District does not have a treatment process which at present utilizes coagulation, sedimentation and filtration, it does produce an effluent which meets and even exceeds the basic constituent limits desired by the State Department of Health."

We also noted in the same order that "(f)rom the testimony presented...concerning levels of treatment, the configuration of Malibu Canyon, and both air and water temperatures during the mid-November to mid-March period, we must conclude that the dangers from virus due to the subject discharge are negligible."

Further uncontradicted expert evidence of a substantial and persuasive nature was received at the Regional Board hearing on March 22, 1976, which indicated no health problems could be anticipated from the proposed year-round discharge.

Again, on the basis of the present record, we must fairly conclude that the vast preponderance of the evidence indicates that the proposed year-round discharge to Malibu Creek does not present a threat to public health.

III. CONCLUSIONS

After review of the record, and for the reasons heretofore expressed, we have reached the following conclusions:

1. The Regional Board proceedings on March 22, 1976, relative to petitioner, did not constitute a failure to act.

The action of the Regional Board on March 22, 1976, prohibited a proposed year-round discharge by petitioner to Malibu Creek.

2. The Regional Board may, under appropriate circumstances, prohibit a proposed discharge, and may also limit the flow of a proposed discharge.

3. A total prohibition on discharge, or a limit on discharge flow is justified where necessary:

(a) To implement properly an approved and relevant water quality control plan;

(b) To protect water quality and beneficial uses, i.e., to prevent nuisance, pollution or contamination;

(c) To protect adequately against environmental damage, to minimize adverse environmental impacts, or to insure long-term protection of the environment.

4. The present record does not justify a prohibition against the proposed year-round discharge of petitioner to Malibu Creek.

5. The Regional Board shall issue a notice for adoption of waste discharge requirements for the proposed year-round discharge of petitioner to Malibu Creek. In the event that the proposed discharge is prohibited, the Regional Board shall specify those facts which in its estimation justify the prohibition.

IV. ORDER

IT IS HEREBY ORDERED that the Regional Board reconsider the proposed year-round discharge of petitioner to Malibu Creek consistent with the provisions of this order.

Dated: **AUG 19 1976**

/s/ John E. Bryson
John E. Bryson, Chairman

/s/ W. Don Maughan
W. Don Maughan, Vice Chairman

/s/ W. W. Adams
W. W. Adams, Member

/s/ Roy E. Dodson
Roy E. Dodson, Member

/s/ Jean Auer
Jean Auer, Member